

THE MARK O. HATFIELD

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Insurance -Declaratory Judgment

Judge Hubel granted defendants' insured motion to dismiss a declaratory judgment action brought by the insurer. An underlying tort action was pending against the insureds and other defendants in Montana. The claims in that action included negligence and products liability as well as breach of warranty. The claims were brought by the estates of two women who had been killed when a re-tread tire sold by the insureds and installed by another defendant on the front wheel of a cement truck, disintegrated causing the driver of the truck to lose control and collide with the car in which the women were riding. Although the defendant installer and defendant cement truck company had settled with the estates, the claims against the insured seller remained pending. The insureds had a summary judgment motion pending before the Montana trial court.

Judge Hubel concluded that (1) the declaratory judgment action and the pending state court

action shared the same subject matter which could result in this court needlessly determining a state law issue; (2) there was some indication of forum shopping; and (3) the case should be dismissed to avoid duplicative litigation. Specifically, the court noted the overlap of issues created by language of the insurance policy regarding coverage of claims being used in the settlement agreement negotiated with the other defendants. Because the scope of the settlement agreement's releases was at issue in the state court case and the near-identical coverage language was at issue in the declaratory judgment action, Judge Hubel concluded that it would be inappropriate to exercise discretion in favor of retaining the declaratory judgment action.

Federated Services Insurance Company v. Les Schwab Warehouse Center, Inc.,
CV 03-1268-HU
(Findings and Recommendation, February 2004, adopted by Judge Mosman, April 21, 2004)

Plaintiff's counsel: Dianne Dailey, Holly Pettit
Defense counsel: Bruce Hamlin, Michael Runyan

Civil Rights

On December 5, 1999, Damon Lowery consumed hallucinogenic mushrooms, fought with a friend, and, when police officers arrived, jumped or fell out of a second story plate-glass window onto a concrete patio. Lowery was surrounded by seven officers, and although unarmed and severely injured, was shot ten times with a "less lethal" shotgun, sprayed with at least six cans of pepper spray, hit numerous times with ASP batons, and finally was forced into the maximum restraint position while an officer stood on his upper body and head. He died at the scene. Lowery's parents sued on behalf of themselves and their estate, alleging that excessive force caused Lowery's death and that Portland failed to adequately train its officers.

After an eight day trial,

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the jury found that the officers did not use excessive force. As a result, the jury never reached the issue of whether excessive force caused Lowery's death or whether Portland failed to adequately train its officers. Plaintiffs filed post-trial motions asking for judgment as a matter of law that excessive force was used on Lowery (regardless of whether it caused his death), and alternatively, for a new trial on these matters.

Magistrate Stewart found that the officers involved were liable for excessive force as a matter of law for the first four to five "less lethal" rounds and the first three cans of pepper spray used on Lowery while he was still lying or kneeling on the patio. Alternatively, Judge Stewart granted a new trial on this initial use of force.

Judge Stewart denied the motion for judgment as a matter of law on the subsequent force used after Lowery charged one of the officers and grabbed him about the waist. A reasonable jury could conclude Lowery posed a significantly greater risk to the officers. In the alternative, Judge Stewart, after raising the issue *sua sponte*, concluded that she erred by failing to instruct the jury that: (1) it could find that the use of force was excessive at any point during Lowery's encounter with defendants, and not at other points; (2) a strong

governmental interest is required to justify the use of "less lethal" shots, pepper spray, and standing on a person who is in the maximum restraint position; and (3) if the initial use of "less lethal" shots and pepper spray provoked Lowery, then the subsequent force used to restrain him also could be unreasonable – even if otherwise reasonable. Judge Stewart held that although plaintiffs did not request these jury instructions, they were necessary to prevent a miscarriage of justice.

Finally, Judge Stewart rejected plaintiff's motion for a new trial based on inconsistent verdict forms.

Marsall v. City of Portland,
CV 01-1014-ST

(Opinion, May 7, 2004)

Plaintiff's Counsel:

Christian Bottoms

Defense Counsel:

Harry Auerbach

Constitutional Law

A United States citizen and former Libyan national filed a Bivens action against four agents with Immigration and Customs Enforcement (ICE) alleging that his due process rights were violated when his U.S. and Libyan passports were seized at the Portland International Airport. Defendants asserted that the passports were seized as

evidence of possible criminal and civil violations of the federal Travel Act. The Act generally prohibits travel to Libya by U.S. citizens without prior registration with the Treasury Department. Plaintiff had traveled to Libya to visit his ailing mother, but had failed to register. Plaintiff's passports were returned 54 days after their seizure.

Judge Jones granted a defense motion to dismiss the action with prejudice for failure to state a constitutional claim. The court recognized that the government has inherent authority to conduct border inspections and seizures, even without reasonable suspicion. However, citizens do not "own" their passports and the government's temporary retention was not a "taking" for public use. The court also rejected the argument that plaintiff was entitled to pre-seizure notice as applied to the border setting or that plaintiff should have been given a more individualized notice of his remedies for seeking the return of his passports.

Belazi v. Meisenheimer,
CV No. 03-1746-JO

(Opinion, July 8, 2004).

Plaintiff's Counsel:

Kenneth Kaufmann

Defense Counsel:

Kelly Zusman

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